In the District Court of the United States for the Southern District of Illinois, Southern Division

CIVIL ACTION No. 243

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, AND ILLINOIS TERMINAL RAILROAD COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JURISDICTIONAL STATEMENT BY THE DEFENDANT-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

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U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented

The decree sought to be reviewed was entered on June 14, 1943. The petition for appeal was presented and allowed on 1943, together with an assignment of errors.

C. Nature of cause and of rulings below

This is an appeal from a final decree of the District Court of the United States for the Southern District of Illinois, Southern Division, entered July 14, 1943, setting aside and permanently enjoining an order of the Interstate Commerce Commission entered May 6, 1941, in the case of *A. E. Staley Manufacturing Company Terminal Allowance,* 245 I. C. C. 383.

The report and order of May 6, 1941, found that switching service or "spotting" within the Staley plant is a plant service rather than a common-carrier service covered by the line-haul rates, and when performed by carriers without charge, would result in refunding or remitting a portion of charges made under line-haul rates, constitute a preference not accorded shippers generally and be a violation of Section 6 (7) of Part I of the Interstate Commerce Act (49 U. S. C. sec. 6 (7)). The Investigation and Suspension Docket 4736, which was consolidated, heard and decided with the *Staley* case, related to tariffs filed by the plaintiff carriers, effective December 15, 1939, proposing to cancel the charge of $2.50 per car that had been established under tariffs filed by all carriers serving that plant. In accord with its findings and conclusions, the Commission entered an order requiring plaintiff-appellees to cancel the suspended tariffs effective August 15, 1941.

The report and order of May 6, 1941, resulted from the reopening and reconsideration of the *Staley* case which had previously been heard and decided on May 22, 1936 (215 I. C. C. 656), as the 55th Supplemental Report under *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,* 209 I. C. C. 11. The *Ex Parte 104* proceedings were instituted by the Commission upon its own motion by order dated July 6, 1931. A large volume of evidence was developed relating to terminal services and allowances at numerous industrial plants throughout the country. Upon that record, the Commission found that many industries received free switching services, or allowances therefor when performed by the industry, while many others received no such free service or allowance under similar circumstances, and that such practice obtained in relatively small areas of the country and had never been extended to New England, the Southeast, or the extreme Southwest. It was found that where switching services involve distribution of cars over intricate systems of interlacing tracks within industrial plants at points of loading and unloading, not at the convenience of the carriers but to meet industrial needs, the rendering of such switching service (or allowance therefor) is beyond the line-haul obligation, constitutes a preference not accorded shippers generally, and is unlawful under Section 6 (7) of the Interstate Commerce Act.

In proceedings under *Ex Parte 104*, the Commission decided the question of terminal services or allowances in respect to a number of industrial plants, each as a supplemental report to *Ex Parte 104*. The *Staley* case was decided as the 55th Supplemental Report thereto. At that time, switching services were performed by Staley at its plant, and the carriers granted it allowances therefor. The Commission found these allowances to be for services beyond the line-haul obligation, a preferential service not accorded shippers generally, and a violation of Section 6 (7) of the Interstate Commerce Act.

A number of these industries, including the Staley Company, instituted court action to set aside and enjoin the Commission orders. Some of these cases reached the Supreme Court upon appeal, and the Commission's orders were sustained in *United States* v. *American Sheet and Tin Plate Company*, 301 U. S. 402; *Goodman Lumber Company* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; and *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. Afer these decisions, the Staley Company voluntarily dismissed its court action which had not yet been decided by the district court.

On March 16, 1938, the Staley Company filed a had been substituted for an *ad interim* pool arreconsideration, on the ground that a new ar-

rangement, with certain changes in the switching, petition with the Commission for rehearing and rangement. By order of April 8, 1938, the Commission accordingly reopened the *Staley* case to determine what changes, if any, had been made in switching and whether the previous decision might be thereby affected.

On November 15, 1937, the five carriers serving the Staley plant filed tariffs establishing the charge of $2.27 per car (later increased to $2.50) for switching services within that plant. While the rehearing and reconsideration of the *Staley* case was pending, three of these five carriers, plaintiff-appellees herein, filed schedules to become effective December 15, 1939, proposing to cancel the charge of $2.50 per car then in effect. Because those schedules depended for justification upon the decision in the *Staley* case, the Commission ordered the schedules suspended in proceedings I. & S. 4736 and consolidated those proceedings with the *Staley* rehearing.

At this rehearing proceeding, the Staley Company and the three rail carriers introduced evidence tending to show that terminal services had been and were being rendered without charge at a number of neighboring, competitive industrial plants with allegedly similar switching operations. No direct proceeding has ever been instituted before the Commission by the Staley Company, the plaintiff-appellee carriers, or anyone else, requir-

ing consideration and decision by the Commission as to terminal services rendered at such other industrial plants, and the Commission had not, on its own motion, instituted any proceedings upon which to base a decision of such questions.

The Commission's report of May 6, 1941, held, in respect to the evidence as to such other plants that it did not satisfactorily show that the conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant, and if it did, that it would only show the probable existence of unlawful practices at such plants and need for investigation.

The complaint herein was filed by the Wabash, Illinois Central, and Illinois Terminal Railroads, on June 1, 1942, pursuant to provisions of Section 41 (28) and Sections 43–48 of Title 28, U. S. C., against the United States and the Interstate Commerce Commission, seeking to set aside and enjoin the Commission order of May 6, 1941, as entered in the above-described proceedings. The Staley Company intervened in behalf of the plaintiffs. The principal grounds stated in the complaint are that the Commission acted beyond the scope of its statutory authority, contrary to law; that the order of May 6, 1941, is unsupported by substantial evidence; and that the report and order resulted in discrimination and preference against the Staley Company, since the Commission had failed to enforce similar switching

charges against nearby, competitive industries. The opinion of the specially constituted court recognized, as unchallenged, the validity of the Commission's action under prior orders entered under *Ex Parte 104,* presumably including the authority of the Commission to decide in the *Staley* case whether or not the terminal services there are beyond the line-haul obligation. The court stated the principal contention to be that the Staley Company is unduly prejudiced because competing industries in the Decatur, Illinois, vicinity are receiving spotting services from the carriers without charge, which amounts to a continuing discrimination against Staley. It held, Circuit Judge Evans dissenting, that the report and order oblige the carriers to discriminate against Staley, in violation of Sections 2 and 3 of the Interstate Commerce Act (49 U. S. C. secs. 2, 3); that the order is discriminatory, unjust, and unreasonable; and that the order is, in part, unsupported by the evidence.[1] The court opinion attempts to distinguish two decisions of the Supreme Court upon the erroneous assumption that questions of discrimination as here presented were not there before the Court.

The district court has improperly assumed the decision of questions of fact as to the similarity

[1] Upon the basis of the partial record before it, the court incorrectly held that finding of fact three was without evidentiary support and that conclusion of law three was consequently unwarranted.

of switching services at the Staley plant as compared to services rendered to other plants, and as to discrimination and preference under Sections 2 and 3 of the Interstate Commerce Act. Jurisdiction of the court in such cases does not include authority to decide administratively questions of discrimination and preference under Sections 2 and 3, matters which are for the determination of the Commission.

The questions presented by this appeal are substantial. They involve interpretation and application of Sections 2, 3, and 6 (7) of the Interstate Commerce Act relating to practices by carriers of discriminations and preferences and the scope of court authority upon review of Commission orders under the provisions of Sections 41 (28) and 43–48 of Title 28, U. S. C. The decision of the lower court would, if allowed to stand, establish principles impinging upon the power of the Commission to remove and prohibit discriminations and preferences prohibited by the Interstate Commerce Act and would avoid the enforcement of principles already approved by the Supreme Court. Since the decision appears contrary to well-recognized principles of judicial review in such cases, and to be contrary to Supreme Court decisions in similar cases, it is important that this decision be reviewed.

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D. Cases sustaining the Supreme Court's jurisdiction on appeal

Board of Trade of Kansas City v. *United States*, 314 U. S. 534.

Union Stock Yard Co. v. *United States*, 308 U. S. 213.

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282.

Florida v. *United States*, 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States*, 272 U. S. 658.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197.

E. Decree and opinion of the district court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and the final decree of the district court.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated July 30th, 1943.

CHARLES FAHY,
Solicitor General,
HOWARD L. DOYLE,
United States Attorney,
TOM C. CLARK,
Assistant Attorney General,
ROBERT L. PIERCE,
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for the Interstate Commerce Commission.

Indorsed: Filed Aug. 26, 1943.
G. W. SCHWANER,
Clerk.

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v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before a three-judge District Court composed of Evans, Circuit Judge, and Lindley and Briggle, District Judges

BRIGGLE, *District Judge:*

This is a proceeding to set aside the order of the Interstate Commerce Commission, entered May 6, 1941, entitled *Report on Further Hearing of Issues Included in the 55th Supplemental Report*, 245 I. C. C. 383, which report and order may be said to be supplementary to *Ex Parte 104, Practices of Carrier Affecting Operating Revenues or Expenses; Part 2, Terminal Services*, 209 I. C. C. 11. The Plaintiffs are common carriers whose

lines of railroad traverse and serve the city of Decatur and the surrounding area in the Southern District of Illinois. The Intervenor, A. E. Staley Manufacturing Company is engaged in the processing of grain, including corn and soy beans and the manufacture of various products therefrom at Decatur, Illinois. It receives annually by rail at its plant large quantities of grain, soy beans, and raw materials of all kinds and ships by rail from its plant large quantities of manufactured products.

The history of the proceeding is long. Briefly stated, it arose in 1931, when the Commission upon its own motion instituted a proceeding entitled *Ex Parte 104* which was an investigation of practices of Class 1 Rail Carriers in respect to terminal switching charges and allowances paid by carriers where industries performed their intraplant switching or spotting services. Hearings were held throughout the country in which many industries and carriers participated and a large volume of evidence was taken. On May 14, 1935, the commission made its report, 209 I. C. C. 11, in which it stated its general conclusions as to the obligations of line haul carriers to render spotting service and the principles governing such obligations. Subsequent thereto the Commission made numerous supplemental reports undertaking to apply the principles there enunciated to specific plants and industries, some of which have been

before and have been approved by the Supreme Court, notably *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corporation* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156. The 55th of these Supplemental Reports, made on May 22, 1936, concerned spotting service at the plant of the Intervenor, A. E. Staley Manufacturing Company. In this report the Commission found that the intraplant spotting of cars then performed by the Staley Company, for which the railroads paid Staley an allowance was a private service not within the obligations of the carriers and covered by their line-haul rate and that the assumption of such obligation by the carriers was a violation of Section 6 (7) of the Interstate Commerce Act. The Commission made an order requiring the carriers to cease and desist from the payment of such allowances.

Subsequently, the Staley Company ceased performing such spotting service and arranged with the carriers to do the same and a charge of Two Dollars and Fifty Cents ($2.50) per car was established for such service, in addition to the line-haul rates. Later the plaintiff carriers by schedules effective December 15, 1939, proposed to cancel such charge for spotting services in the Staley plant but the Commission by their order

of May 6, 1941, suspended the operation of such proposed schedule, leaving the spotting charge against Staley in full force and effect. Neither Plaintiffs or Intervenor challenges in this proceeding the validity of prior orders entered in *Ex Parte 104,* but the principal point of contention arises from the assertion of the Plaintiffs and the Intervenor and denial by defendants that by the order of May 6, 1941, the Staley Company is unduly prejudiced by reason of the fact that competing industries at Decatur, Illinois, and other places within the state are receiving spotting services from the carriers without charge. The carriers and Staley assert that the order exacting a charge from Staley amounts to a continuing discrimination against Staley.

The Commission made six findings of fact and six conclusions of law. Finding of fact five is, as follows:

> 5. All services between the tracks described in the immediately preceding finding and points of loading and unloading within the plant area of the Staley Company are services in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings and spurs.

Conclusion of law three is, as follows:

> 3. That the performance by respondents, without charge in addition to the line-haul rates and charges, of service (a) from Bur-

well yard tracks to points of unloading within the plant area of the Staley Company (b) from points of loading within said plant area to Burwell yard tracks on loaded cars moved to that yard, and (c) from points of loading within said plant area to Wabash storage or general yard tracks on loaded cars that do not move to the Burwell yard, would result in the Staley Company receiving a preferential service not accorded to shippers generally and would result in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act.

Among other contentions, it is claimed by Plaintiffs and Intervenor that finding five is unsupported by the evidence or by the finding of any basic facts to support it, and that Conclusion 3 is, therefore, unwarranted.

At the hearing before the Commission much evidence was introduced on this point to show that spotting service was being rendered by the carriers without charge other than the line-haul tariffs, to numerous industries at Decatur and throughout Illinois and particularly to those engaged in direct competition with Staley. We think it fair to say that the evidence in the record is uncontradicted that Staley is the only concern at Decatur or within a reasonable radius

thereof that is now being required to pay a spotting charge. At Decatur, Illinois, the Archer-Daniels-Midland Co., Decatur Soya Bean Products Co., and Spencer Kellogg & Sons, all of whom are in direct competition with Staley are without exception receiving spotting service under conditions comparable to those existing at the Staley plant. The Corn Products Refining Co. at Argo, Illinois, shown by the evidence to be one of the largest producers of corn products in the country, with some eighteen or twenty miles of track within its plant and with at least twenty points of loading and unloading within the plant, has always received spotting service. This plant is one of Staley's chief competitors. The Plaintiffs, Illinois Central Railroad Company and Illinois Terminal Railroad Company make no spotting charge for the delivery or receipt of freight upon their entire systems with the single exception of the Staley plant. The Plaintiff, Wabash Railroad Company was obliged to except the Staley Plant from the operation of their general rule that no charge be made for spotting cars. Witnesses appeared from numerous competitors of Staley, such as American Maize Products Co., Penick & Ford, Ltd., Hubinger Co., Union Starch & Refining Co., and Allied Mills, all asserting that they knew of no industry required to pay a spotting charge similar to Staley.

The Commission brushed aside this feature of the case with the following statement in its report:

> Considerable evidence was introduced showing that spotting is performed without charge in addition to the line-haul rates at various plants, some of which compete with the plant of the Staley Company. The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant. If it did, it would only show the probability of the existence of unlawful practices at such plants and the need for investigation in connection therewith.

While the Commission says that the evidence does not satisfactorily show that the conditions at other plants are substantially similar to those at the Staley plant, yet the *only* evidence in the record on this subject very strongly tends to show similarity. By its further statement that if it did it would only demonstrate the need for investigations at other plants, it appears that the Commission was of the belief that each case must stand on its own bottom and be considered by the Commission independent of any other and without relation to the palpable inequities bound to flow from an order not applicable to all similarly situated. We think this too narrow a view. It is suggested that it is no defense for one charged with an offense to retort that others are

guilty of like offenses. However sound this doctrine may be in relation to criminal proceedings it does not seem to be quite appropriate to the situation here presented. Where one industry of many in a highly competitive field is singled out and subjected to a tariff not imposed on any other and under compulsion of the order of the Commission obliged to pay such tariff for a number of years without relief and without action to establish like tariffs for competing industries, the order becomes an instrument of destruction. Such treatment long continued could only mean extinction of the industry thus affected. So surely as "the power to tax is the power to destroy," so is the power of rate regulation when applied inequitably.

We think the finding of the Commission that the practice of furnishing spotting service to Staley by the carriers would accord Staley more favorable treatment than others, not supported by the evidence. The substantial evidence indicates quite the contrary. It indicates that under the present order Staley is being discriminated against. It thwarts the real purpose of the Commission to remove discrimination in certain instances where carriers may have accorded a preferential service to one customer over another. The order here obliges the carriers to discriminate against Staley, and, as they assert against their will, and in violation of Sections 2 and 3 of the Act.

We think that *United States* v. *American Sheet and Tin Plate Co., supra,* is not to be deemed authority contrary to the view here expressed. While it is true that the Supreme Court there said in affirming the order of the Commission that the Commission had properly held that each case must be decided upon the circumstances disclosed, yet the question of discrimination here presented was not before the Court. In that case and in *United States* v. *Pan American Petroleum Co., supra,* the Court was dealing with a number of like orders in relation to a group of competing industries and no question of one industry having received different treatment from all others was before the Court.

To give full meaning to the Act and to translate the intention of Congress into equitable application requires a consideration of the Act as a whole. We know from Sections 2 and 3[1] that it

[1] SEC. 2. Special rates and rebates prohibited. If any common carrier subject to the provisions of this chapter shall, directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed

was the express purpose of Congress to require carriers to accord equal and just treatment to all shippers. The evil to be corrected in this respect was the tendency of carriers in some instances to accord some shippers more favorable treatment than others. It was expressly declared a vicious practice to give one shipper a preference or advantage over another, or conversely, to subject any shipper to any undue or unreasonable prejudice or disadvantage. It cannot be gainsaid that that is precisely what the carriers are being forced to do in the case at bar under compulsion of the order in question. The Commission in its purpose to do justice to the carriers has inadvertently brought about such flagrant injustice to the intervening shipper as to shock the conscience of a court of equity. So far as we know, this precise question has never been before any Court, but with a firm belief in the doctrine that no wrong shall exist without a remedy it seems to us that the Commission must meet the problem head on and devise some over-all method of deal-

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guilty of unjust discrimination, which is prohibited and declared to be unlawful.

SEC. 3. Preferences; interchange of traffic; terminal facilities—(1) Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

ing with competitive industries that will eliminate the injustice here so apparent. Otherwise, the purpose of the Act will be thwarted and the resultant inequities will outweigh the evils sought to be corrected. See *U. S.* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499.

We think the order in question discriminatory, unjust and unreasonable, and in so far as finding five and conclusion three are concerned not supported by the evidence. The prayer for injunction is allowed.

Intervenor's request for accounting and reimbursement is a question for the Commission.

EVANS dissents.

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FINDINGS OF FACT

1. Plaintiffs are railroad corporations whose lines of railroad traverse the area included within the southern district of Illinois. Each of said plaintiffs owns and operates lines of railroad which reach and serve the City of Decatur, Macon County, Illinois, in said district.

2. The A. E. Staley Manufacturing Company is engaged in the processing of grain, including corn and soybeans, and the manufacture of various products thereof at Decatur, Illinois. It receives annually by rail at its plant large quantities of grain, soybeans, and raw materials of all kinds, and ships by rail from its plant large quantities of products manufactured by it.

3. The Interstate Commerce Commission in a certain supplemental report, entered in a proceeding known as *Ex Parte 104, Part II, Terminal Services,* 215 I. C. C. 656, hold upon the record then before it that the interchange tracks at the Staley plant described in the record were reasonably convenient points for the delivery and receipt of carload freight; that the transportation services for which these plaintiffs were compensated in their line-haul rates began and ended at said points, and that the services then performed by the A. E. Staley Manufacturing Company beyond those points were plant services. The Commission further held that by the payment of an allowance to the A. E. Staley Manufacturing Company for the services performed beyond those points on interstate shipments, these plaintiffs provided the means by which the A. E. Staley Manufacturing Company enjoyed a preferential service not accorded to shippers generally, and refunded or remitted a portion of the charges collected or received as compensation for the transportation of property in violation of Section 6 (7) of the Interstate Commerce Act, and respondents therein were ordered to cease and desist from further payment of said allowance.

4. The Commission's aforesaid order of May 22, 1936, was first issued to become effective September 15, 1936, and was postponed from time to time and did not take effect until June 15, 1937. On

June 23, 1936, however, the A. E. Staley Manufacturing Company ceased to perform switching service at its plant, the aforesaid allowance was thereupon discontinued and canceled, and the services connected with the placing of cars for loading and unloading at points within the plant of the A. E. Staley Manufacturing Company were performed by the Wabash Railroad beginning with June 23, 1936.

5. Plaintiffs, on November 15, 1937, in compliance with the findings of the Commission in its said report in *Ex Parte 104, Part II, Terminal Services*, 215 I. C. C. 656, established a charge of $2.27 per car against the A. E. Staley Manufacturing Company for the placement of cars at loading and unloading points within said Company's plant. This charge was later increased to $2.50 per car. At the time the charge of $2.27 was proposed, the A. E. Staley Manufacturing Company filed a petition with the Commission protesting against the charge and seeking a suspension of the tariffs stating the charge. The A. E. Staley Manufacturing Company, in its protest, said that the application of the charge would create undue prejudice and unjust discrimination against A. E. Staley Manufacturing Company.

6. The A. E. Staley Manufacturing Company filed several petitions with the Interstate Commerce Commission, asking the Commission to reopen the proceedings known as *Ex. Parte 104,*

Part II, Terminal Services, 215 I. C. C. 656. (Petitions of June 16, 1936, May 29, 1937, and March 16, 1938.)

7. The Interstate Commerce Commission, by an order dated April 8, 1938, modified by its order of May 4, 1938, reopened the *Ex Parte 104, Part II, Terminal Services* proceeding for further hearing, limited to the presentation of evidence of changes since the prior hearing in operating or other conditions with respect to the interchange, delivery, or receipt of cars handled to or from the Decatur, Illinois, plant of the A. E. Staley Manufacturing Company. A tentative report on the further hearing was proposed on or about November 1, 1938, by Special Examiner King of the Interstate Commerce Commission.

8. The Interstate Commerce Commission, in its report of May 6, 1941, said that an incomplete record resulted from that limited reopening, and on July 29, 1939, the Commission, on its own motion, again reopened the proceeding for further hearing concerning, and limited to, the operating or other conditions at the A. E. Staley Manufacturing Company plant with respect to delivery or receipt of cars handled to or from its plant, including interchange arrangements with the connecting lines on such traffic, and to intra-plant movements within said plant.

9. Notwithstanding this order of July 29, 1939, reopening the case for further hearing, the Com-

mission took no action toward setting the case down for a further hearing.

10. Plaintiffs, on November 10, 1939, filed tariff schedules to become effective on December 15, 1939, whereby they proposed to cancel the charge of $2.50 then being collected from the A. E. Staley Manufacturing Company for the placement of cars for loading and unloading at points within the plant of the A. E. Staley Manufacturing Company and further provided that their freight rates to and from Decatur include the movement of the cars to and from loading and unloading points in the Staley plant. These tariff schedules were suspended by the Commission in *investigation and suspension docket No. 4736, switching charges at Decatur, Illinois.*

11. Following the suspension of Plaintiffs' tariff schedules, the Commission held a hearing at Decatur, Illinois, on April 23–25, 1940, in *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Illinois, and Ex Parte No. 104, Part II, Terminal Services, A. E. Staley Manufacturing Company, Terminal Allowance.*

On May 6, 1941, the Commission made its report in the two cases cited in the preceding paragraph, and entered an order on May 6, 1941, in the proceeding known as *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Illinois.*

12. The Commission, in its report of May 6, 1941, made the following finding:

> Considerable evidence was introduced showing spotting is performed without charge in addition to the line-haul rates at various plants, some of which compete with the plant at the Staley Company. The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant. If it did, it would only show the probability of the existence of unlawful practices at such plants and the need for investigations in connection therewith.

13. The Interstate Commerce Commission, notwithstanding these findings, and notwithstanding the fact that five years had elapsed since the date of the Commission's first report dealing with terminal services at the plant of the A. E. Staley Manufacturing Company, had made no investigation of the spotting practices at other plants, nor has it since May 6, 1941, done so.

14. The Commission's order of May 6, 1941, required the plaintiffs to cancel on or before June 20, 1941, the tariff schedules that they filed on November 10, 1939, under which they proposed to cancel the spotting charge of $2.50 then being collected from the A. E. Staley Manufacturing Company, for the placement of cars for loading and unloading at points within the plant of the A. W. Staley Manufacturing Company and defining the services

as being included in the freight rates. The Commission's order was complied with by the plaintiffs.

15. Plaintiffs have not been required or directed by the Interstate Commerce Commission to make a charge for the services they perform in placing cars at points of loading and unloading within plant areas at Decatur or elsewhere, except in the case of the charge they have been required to continue against the A. E. Staley Manufacturing Company under the Commission's order of May 6, 1941. Plaintiffs have not been required or directed by the Interstate Commerce Commission to make such a charge against any competitor of the Staley Company served or reached by them.

16. The Commission has not set forth in its report of May 6, 1941, in *Investigation and Suspension Docket 4736, Switching Charges at Decatur,* any facts that show what the services are that these plaintiff's render shipper generally in the receipt and delivery of cars on team tracks or industrial sidings and spurs. The Commission has not set forth in its report of May 6, 1941, any facts that show that, if the plaintiffs were permitted to place cars at points of loading and unloading within the plant of the A. E. Staley Manufacturing Company without the assessment of a charge over and above the line-haul rates, the A. E. Staley Manufacturing Company would receive a preferential service not accorded to shippers generally.

CONCLUSIONS OF LAW

1. It was arbitrary action on the part of the Interstate Commerce Commission to require the plaintiffs to continue over the years a spotting charge against the A. E. Staley Manufacturing Company, for placing cars within the Staley Company's plant when the Commission had failed and refused to make any investigation respecting the switching services rendered at the plants of the competitors of the Staley Company in the Decatur area and other places, in order to determine whether or not the switching services at the Staley Company's plant were actually in excess of those rendered without a spotting charge at the plants of these competitors of the Staley Company, and whether or not the Staley Company, if no charge were made against it for placing cars within its plant, would receive a preferential service as compared with the switching services rendered at the plants of its competitors.

2. Basic Finding No. 5 and Conclusion No. 3 set forth in the report of the Interstate Commerce Commission of May 6, 1941, upon which the order of May 6, 1941, was predicated, are not supported by the facts more particularly stated in the report, and are without support in the evidence and are contrary to the evidence.

3. The Interstate Commerce Commission failed and refused to apply and enforce the standards laid down in the Interstate Commerce Act that

control its action, and pursuant to which standards the rights of parties before it are to be determined.

4. The order in question is arbitrary, discriminatory, unjust, and inequitable.

5. The plaintiffs are entitled to a decree that the order of May 6, 1941, is null and void, and perpetually enjoining enforcement of the said order.

WALTER C. LINDLEY,
United States District Judge.

CHAS. G. BRIGGLE,
United States District Judge.

EVANS dissents, not from these findings but from the conclusion that plaintiffs are entitled to a decree.

In the District Court of the United States for the Southern Distri of Illinois, Southern Division

CIVIL ACTION No. 243

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, AND ILLINOIS TERMINAL RAILROAD COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL DECREE

(July 14, 1943)

On the twenty-sixth day of April 1943, this cause came on for final hearing on the plaintiff's prayer for a permanent injunction, and all parties being present by counsel, the Court, after hearing the evidence and the arguments of counsel and considering the briefs filed, and being fully advised in the premises, finds the facts and the law to be as contained in the findings of fact, conclusions of law, and opinion are made a part of this Final Decree with the same force and effect as if they had been set out in full herein.

Whereupon, it is ordered, adjudged, and decreed as follows:

(1) That the order of the Interstate Commerce Commission entered on May 6, 1941, in the proceeding shown as *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Illinois,* is hereby set aside and annulled.

(2) That the United States of America and the Interstate Commerce Commission, and each of them, and their officers, attorneys, agents, and employes be and they are hereby permanently and forever enjoined from enforcing or in any manner attempting to enforce the said order of May 6, 1941.

(3) That the United States of America and the Interstate Commerce Commission, and each of them, and their officers, attorneys, agents, and employees be and they are hereby permanently and forever enjoined from interfering with or prohibiting the posting, and filing, and the establishment of the tariff schedules filed by the plaintiff to become effective on December 15, 1939, which tariff schedules were suspended by the Interstate Commerce Commission's order of November 21, 1939, in *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Illinois,* and which tariff schedules the plaintiffs herein were required to cancel by said order of the Interstate Commerce Commission of May 6, 1941, set aside and annulled by this Decree.

(4) That this Court retains jurisdiction of this cause to enforce the terms of this Decree and to make such further orders herein as may be necessary to enforce said terms.

Dated July 14th, 1943.

WALTER C. LINDLEY,
United States District Judge.

CHAS. G. BRIGGLE,
United States District Judge.

EVANS, Circuit judge, dissenting.

Filed and entered July 14, 1943.

G. W. SCHWANER,
Clerk.

Indorsed: Filed Aug. 26, 1943.

G. W. SCHWANER,
Clerk.